

## PHARMACY BOARD[657]

### Adopted and Filed

Pursuant to the authority of Iowa Code sections 17A.3, 17A.22, and 147.76, the Board of Pharmacy hereby rescinds Chapter 35, “Contested Cases,” and Chapter 36, “Discipline,” Iowa Administrative Code, and adopts new Chapters 35 and 36 with the same titles.

The amendments rescind current chapters regarding contested cases and discipline and adopt new chapters in lieu thereof. Many of the current rules are reorganized and moved from one chapter to another, and duplicative rules are eliminated. Because many of these rules are cross-referenced between the two chapters, and because disciplinary actions are governed by the procedures regarding contested cases, these two chapters have been reviewed and reorganized and are now proposed jointly.

Pursuant to the requirements of Iowa Code chapter 17A, the rules establish the procedures relating to contested cases, including required filings and timelines, requirements for notice of hearing and statements of charges, identification of the presiding officer, and the duties and authority of the presiding officer. The rules address the procedures for disciplinary hearings and nondisciplinary hearings, describe the circumstances under which a presiding Board member may need to withdraw from participation in a contested case hearing, identify and prohibit ex parte communications, establish the standards of evidence in a contested case, provide for default judgment, and define a final decision of the Board.

The rules identify the grounds for disciplinary action against a license, registration, or permit issued by the Board of Pharmacy, identify the disciplinary sanctions that may be imposed by the Board upon finding a violation of applicable Iowa Code or Iowa Administrative Code requirements, and identify minimum procedures for reinstatement of a license, registration, or permit that was previously suspended, revoked, or surrendered pursuant to these rules. The rules identify the Board’s authority to issue an administrative subpoena, the required basis for such a subpoena, and the procedures for the issuance and enforcement of a subpoena.

The rules establish the requirements for issuance of a confidential order for mental or physical examination of a licensee or registrant that is not a disciplinary action or order, provide for the utilization of a peer review committee when needed, and provide for the assessment of a hearing fee and authorized hearing costs on the subject of a disciplinary hearing that results in disciplinary action against a licensee.

Requests for waiver or variance of the discretionary provisions of these rules will be considered pursuant to 657—Chapter 34.

Notice of Intended Action was published in the June 21, 2017, Iowa Administrative Bulletin as **ARC 3135C**. The Board received no written comments regarding the proposed amendments. The adopted amendments differ from those published under Notice. Minor changes have been made as follows:

- In subrule 35.35(1), the Iowa Code reference is changed from section 17A.18 to section 17A.18A.
- Subrule 36.3(1) has been amended to include “that may violate the board’s rules or that are related to” and now reads as follows:

“**36.3(1) General.** The board may, upon receipt of a written or verbal complaint or upon its own motion pursuant to other evidence received by the board, review and investigate alleged acts or omissions that may violate the board’s rules or that are related to the ethical or professional conduct of a licensee.”

- In subrule 36.10(2), the last word in the first sentence has been changed from “license” to “licensee.”

The amendments were approved during the August 30, 2017, meeting of the Board of Pharmacy.

After analysis and review of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code sections 17A.10 to 17A.23, 124.304, 124B.12, 126.17, 147.55, 155A.6 to 155A.6B, 155A.12, 155A.13 to 155A.13C, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

These amendments will become effective on November 1, 2017.

The following amendments are adopted.

ITEM 1. Rescind 657—Chapter 35 and adopt the following **new** chapter in lieu thereof:

CHAPTER 35  
CONTESTED CASES

**657—35.1(17A,124,124B,126,147,155A,205,272C) Scope and applicability.** This chapter applies to contested case proceedings conducted by the board of pharmacy.

**657—35.2(17A,272C) Definitions.** Except where otherwise specifically defined by law:

“*Board*” means the Iowa board of pharmacy.

“*Contested case*” means a proceeding defined by Iowa Code section 17A.2(5), including but not limited to licensee disciplinary proceedings, license denial proceedings, and license reinstatement proceedings.

“*Issuance*” means the date of mailing of a decision or order, or date of delivery if service is by other means, unless another date is specified in the order.

“*License*” means any license, registration, or permit issued by the board, regardless of whether the license, registration, or permit is active.

“*Licensee*” means any person or entity possessing a license, registration, or permit issued by the board, regardless of whether the license, registration, or permit is active.

“*Party*” means the state of Iowa, as represented by the office of the attorney general, and respondent or applicant.

“*Probable cause*” means a reasonable ground for belief in the existence of facts warranting the specified proceeding.

**657—35.3(17A) Time requirements.**

**35.3(1) Computation.** Time shall be computed as provided in Iowa Code section 4.1(34).

**35.3(2) Changing time to take action.** For good cause, the presiding officer may extend or shorten the time to take any action, except as precluded by statute or by rule. Except for good cause stated in the record, before extending or shortening the time to take any action, the presiding officer shall afford all parties an opportunity to be heard or to file written arguments.

**657—35.4(17A) Applicability of Iowa Rules of Civil Procedure.** Except as expressly provided in Iowa Code chapter 17A and these rules, the Iowa Rules of Civil Procedure do not apply to contested case proceedings. However, upon application by a party, the board may permit the use of procedures provided for in the Iowa Rules of Civil Procedure unless doing so would unreasonably complicate the proceedings or impose an undue hardship on a party.

**657—35.5(17A,272C) Combined statement of charges and settlement agreement.** Upon a determination by the board that probable cause exists to take public disciplinary action, the board and the licensee may enter into a combined statement of charges and settlement agreement.

**35.5(1)** No licensee is entitled to be offered a combined statement of charges and settlement agreement.

**35.5(2)** Entering into a combined statement of charges and settlement agreement is completely voluntary.

**35.5(3)** The combined statement of charges and settlement agreement shall include a brief statement of the charges, the circumstances that led to the charges, and the terms of settlement.

**35.5(4)** A combined statement of charges and settlement agreement shall constitute the commencement and resolution of a contested case proceeding. By entering into a combined statement of charges and settlement agreement, the licensee waives the right to a contested case hearing on the matter.

**35.5(5)** A combined statement of charges and settlement agreement is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.6(17A,124B,126,147,155A,205,272C) Notice of hearing.**

**35.6(1) *Delivery.*** Delivery of the notice of hearing constitutes the commencement of the contested case proceeding. Delivery may be executed by:

- a.* Personal service, as provided in the Iowa Rules of Civil Procedure; or
- b.* Certified restricted mail, return receipt requested; or
- c.* Signed acknowledgment accepting service; or
- d.* When service cannot be accomplished using the above methods:
  - (1) An affidavit shall be prepared outlining the measures taken to attempt service; and
  - (2) Notice of hearing shall be published once each week for three consecutive weeks in a newspaper of general circulation, published or circulated in the county of last-known residence of the respondent. The first notice of hearing shall be published at least 30 days prior to the scheduled hearing.

**35.6(2) *Contents.*** The notice of hearing shall contain the following information:

- a.* A statement of the time, place, and nature of the hearing;
- b.* A statement of the legal authority and jurisdiction under which the hearing is to be held;
- c.* A reference to the particular sections of the statutes and rules involved;
- d.* A short and plain statement of the matters asserted;
- e.* Identification of all parties, including the name, address and telephone number of the assistant attorney general representing the state;
- f.* Reference to the procedural rules governing conduct of the contested case proceeding;
- g.* Reference to the procedural rules governing settlement;
- h.* Identification of the presiding officer;
- i.* Notification of the time period in which a party may request, pursuant to Iowa Code section 17A.11 and rule 657—35.10(17A,272C), that the presiding officer be an administrative law judge;
- j.* Notification of the time period in which the respondent may file an answer; and
- k.* Notification of the respondent's right to request a closed hearing, if applicable.

**35.6(3) *Public record.*** A notice of hearing is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.7(17A,272C) Statement of charges.** In the event the board finds there is probable cause for taking public disciplinary action against a licensee, the board shall file a statement of charges. The statement of charges shall be incorporated within the notice of hearing. The statement of charges shall set forth the acts or omissions with which the respondent is charged, including the statute(s) and rule(s) which are alleged to have been violated, and shall be in sufficient detail to enable the preparation of the respondent's defense. Every statement of charges prepared by the board shall be reviewed by the office of the attorney general before it is filed. A statement of charges is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.8(13,272C) Legal representation.** Following the issuance of a notice of hearing, the office of the attorney general shall be responsible for the legal representation of the public interest in the contested case. The assistant attorney general assigned to prosecute a contested case before the board shall not represent the board in that case but shall represent the public interest.

**657—35.9(17A,272C) Presiding officer in a disciplinary contested case.** The presiding officer in a disciplinary contested case shall be the board. When acting as presiding officer, the board may request that an administrative law judge perform certain functions as an aid to the board, such as ruling on prehearing motions, conducting the prehearing conference, ruling on evidentiary objections at hearing, assisting in deliberations, and drafting the written decision for review by the board.

**657—35.10(17A,272C) Presiding officer for nondisciplinary hearings.**

**35.10(1) *Request for administrative law judge.*** Any party in a nondisciplinary contested case who wishes to request that the presiding officer assigned to render a proposed decision be an administrative

law judge employed by the department of inspections and appeals must file a request within 20 days after service of a notice of hearing.

**35.10(2) *Grounds for denial.*** The board may deny the request only upon a finding that one or more of the following apply:

- a. There is a compelling need to expedite issuance of a final decision in order to protect the public health, safety, or welfare.
- b. An administrative law judge is unavailable to hear the case within a reasonable time.
- c. The case involves significant policy issues of first impression that are inextricably intertwined with the factual issues presented.
- d. The demeanor of the witnesses is likely to be dispositive in resolving the disputed factual issues.
- e. Funds are unavailable to pay the costs of an administrative law judge and an interagency appeal.
- f. The request was not timely filed.
- g. The request is not consistent with a specified statute.

**35.10(3) *Written ruling.*** The board shall issue a written ruling specifying the grounds for its decision within 20 days after a request for an administrative law judge is filed. If the ruling is contingent upon the availability of an administrative law judge, the parties shall be notified at least 10 days prior to hearing if an administrative law judge will not be available.

**657—35.11(17A,124B,147,155A,272C) Waiver of procedures.** Unless otherwise precluded by law, the parties in a contested case proceeding may waive any provision of this chapter. However, the board in its discretion may refuse to give effect to such a waiver when it deems the waiver to be inconsistent with the public interest.

**657—35.12(17A,272C) Telephone or electronic proceedings.** The presiding officer may resolve prehearing matters by telephone conference in which all parties have an opportunity to participate. Contested case hearings will generally not be held by telephone or electronic means in the absence of consent by all parties under compelling circumstances. Nothing shall prohibit a witness from testifying by telephone or electronic means pursuant to subrule 35.26(3).

**657—35.13(17A) Disqualification.**

**35.13(1) *Reasons for withdrawal from participation.*** A presiding officer or other person shall withdraw from participation in the making of any proposed or final decision in a contested case if that person:

- a. Has a personal bias or prejudice concerning a party or a representative of a party.
- b. Has personally investigated, prosecuted or advocated in connection with that case, the specific controversy underlying that case, another pending factually related contested case, or a pending factually related controversy that may culminate in a contested case involving the same parties. If the licensee elects to appear before the board in the investigation process, the licensee waives this provision.
- c. Is subject to the authority, direction or discretion of any person who has personally investigated, prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy involving the same parties.
- d. Has acted as counsel to any person who is a private party to that proceeding within the past two years.
- e. Has a personal financial interest in the outcome of the case or any other significant personal interest that could be substantially affected by the outcome of the case.
- f. Has a spouse or relative within the third degree of relationship that:
  - (1) Is a party to the case, or an officer, director or trustee of a party;
  - (2) Is a lawyer in the case;
  - (3) Is known to have an interest that could be substantially affected by the outcome of the case; or
  - (4) Is likely to be a material witness in the case.
- g. Has any other legally sufficient cause to withdraw from participation in the decision making in that case.

**35.13(2) “Personally investigated” defined.** The term “personally investigated” means taking affirmative steps to interview witnesses directly or to obtain documents or other information directly. The term “personally investigated” does not include general direction and supervision of assigned investigators, unsolicited receipt of information which is relayed to assigned investigators, review of another person’s investigative work product in the course of determining whether there is probable cause to initiate a proceeding, or exposure to factual information while performing other board functions, including fact gathering for purposes other than investigation of the matter which culminates in a contested case. Factual information relevant to the merits of a contested case received by a person who later serves as presiding officer in that case shall be disclosed if required by Iowa Code section 17A.17(3) and rule 657—35.28(17A,272C).

**35.13(3) Determination that withdrawal is not necessary.** In a situation where a presiding officer or other person knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, that person shall submit by affidavit for the record the relevant information and shall provide for the record a statement of the reasons for the determination that withdrawal is unnecessary.

**35.13(4) Motion for disqualification.** If a party asserts disqualification on any appropriate ground, including those listed in subrule 35.13(1), the party shall file a motion supported by an affidavit pursuant to Iowa Code section 17A.11(3). The motion shall be filed as soon as practicable after the reason alleged in the motion becomes known to the party. If, during the course of the hearing, a party first becomes aware of evidence of bias or other grounds for disqualification, the party may move for disqualification but must establish the grounds by the introduction of evidence into the record. The individual against whom disqualification is asserted shall make the initial determination as to whether disqualification is required. If the individual elects not to disqualify, the board shall make the final determination as to disqualification of that individual as part of the record in the case.

**657—35.14(17A,272C) Consolidation—severance.**

**35.14(1) Consolidation.** The presiding officer may consolidate any or all matters at issue in two or more contested case proceedings where:

- a. The matters at issue involve common parties or common questions of fact or law;
- b. Consolidation would expedite and simplify consideration of the issues involved; and
- c. Consolidation would not adversely affect the rights of any of the parties to those proceedings.

**35.14(2) Severance.** The presiding officer may, for good cause shown, order any contested case proceedings or portions thereof severed.

**657—35.15(17A,272C) Appearance.** The respondent or applicant may be represented by an attorney. The attorney must file an appearance in the contested case. If the attorney is not licensed to practice law in Iowa, the attorney must fully comply with Iowa Court Rule 31.14. If the respondent or applicant is an entity, the entity may designate a representative to appear on behalf of the entity.

**657—35.16(17A,272C) Answer.** An answer may be filed within 20 days of service of the notice of hearing and statement of charges. An answer shall specifically admit, deny, or otherwise answer all material allegations of the statement of charges to which it responds. It shall state any facts supporting any affirmative defenses and contain as many additional defenses as the respondent may claim. An answer shall state the name, address and telephone number of the person filing the answer. Any allegation in the statement of charges not denied in the answer is considered admitted. The presiding officer may refuse to consider any defense not raised in the answer which could have been raised on the basis of facts known when the answer was filed if any party would be prejudiced.

**657—35.17(17A,272C) Service and filing of documents.**

**35.17(1) Filing—when required.** After the notice of hearing, all documents in a contested case proceeding shall be filed with the board.

**35.17(2) Filing—how made.** Filing may be made by delivering or mailing the document to the board office located at 400 S.W. Eighth Street, Suite E, Des Moines, Iowa 50309-4688. Filing may also be made by e-mailing the document to the e-mail addresses identified in the notice of hearing as the appropriate e-mail address for filing. A party electing to file a document via e-mail is responsible for ensuring the document was received.

**35.17(3) Filing—when made.** A document is deemed filed at the time it is delivered to the board, delivered to an established courier service for immediate delivery to the board office, mailed by first-class mail or state interoffice mail to the board office, so long as there is proof of mailing, or e-mailed.

**35.17(4) Service—when required.** Except where otherwise provided by law, every document filed in a contested case proceeding shall be simultaneously served upon each of the parties of record to the proceeding, including the assistant attorney general representing the state. Except for an application for rehearing as provided in Iowa Code section 17A.16(2), the party filing a document is responsible for service on all parties.

**35.17(5) Service—how made.** Service upon a party represented by an attorney shall be made upon the attorney unless otherwise ordered. Service is made by delivery or by mailing a copy to the person's last-known address. Service by mail is complete upon mailing, except where otherwise specifically provided by statute, rule, or order, so long as there is proof of mailing.

**35.17(6) Electronic service.** Service may be made upon a party or attorney by e-mail if the person consents in writing in that case to be served in that manner. The written consent shall specify the e-mail address for such service. The written consent may be withdrawn by written notice served on the parties or attorneys.

**35.17(7) Proof of mailing/e-mailing.** Proof of mailing/e-mailing includes one of the following:

- a. A legible United States Postal Service postmark on the envelope;
- b. A certificate of service;
- c. A notarized affidavit; or
- d. A certification in substantially the following form:

I certify under penalty of perjury and pursuant to the laws of Iowa that, on (date of mailing), I mailed copies of (describe document) addressed to the Iowa Board of Pharmacy, 400 S.W. Eighth Street, Suite E, Des Moines, Iowa 50309-4688, and to the names and addresses of the parties listed below by depositing the same in the United States mail, state interoffice mail, or e-mail when permitted by 657 IAC 35.17(6).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**657—35.18(272C) Investigative file.** The board's investigative file is available to the respondent or applicant upon request only after the commencement of a contested case and only prior to the resolution of the contested case. A licensee that elects to enter into a combined statement of charges and settlement agreement is not entitled to request the investigative file. In accordance with Iowa Code section 272C.6(4), information contained within an investigative file is confidential and may only be used in connection with the disciplinary proceedings before the board.

**657—35.19(17A,272C) Discovery.**

**35.19(1) Scope.** The scope of discovery described in Iowa Rule of Civil Procedure 1.503 shall apply to contested case proceedings.

**35.19(2) Procedures available.** The following discovery procedures available in the Iowa Rules of Civil Procedure are available to the parties in a contested case proceeding: depositions upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, and things; and requests for admission. Unless lengthened or shortened by the presiding officer, the time frames for discovery in the specific Iowa Rules of Civil Procedure govern those specific procedures.

*a.* Iowa Rules of Civil Procedure 1.701 through 1.717 regarding depositions shall apply to any depositions taken in a contested case proceeding. Any party taking a deposition in a contested case shall be responsible for any deposition costs, unless otherwise specified or allocated in an order. Deposition costs include, but are not limited to, reimbursement for mileage of the deponent, costs of a certified shorthand reporter, and expert witness fees, as applicable.

*b.* Iowa Rule of Civil Procedure 1.509 shall apply to any interrogatories propounded in a contested case proceeding.

*c.* Iowa Rule of Civil Procedure 1.512 shall apply to any requests for production of documents, electronically stored information, and things in a contested case proceeding.

*d.* Iowa Rule of Civil Procedure 1.510 shall apply to any requests for admission in a contested case proceeding. Iowa Rule of Civil Procedure 1.511 regarding the effect of an admission shall apply in contested case proceedings.

**35.19(3) *Disclosure and discovery conference.*** The mandatory disclosure and discovery conference requirements in Iowa Rules of Civil Procedure 1.500 and 1.507 do not apply to contested case proceedings. However, upon application by a party, the board may order the parties to comply with these procedures unless doing so would unreasonably complicate the proceedings or impose an undue hardship.

**35.19(4) *Experts.*** Iowa Rule of Civil Procedure 1.508 shall apply to discovery of any experts identified by a party to a contested case proceeding.

**35.19(5) *Service.*** Discovery shall be served on all parties to the contested case proceeding but shall not be filed with the board.

**35.19(6) *Motions.*** A party may file a motion to compel or other motion related to discovery in accordance with this subrule. Any motion filed with the board relating to discovery shall allege that the moving party has previously made a good-faith attempt to resolve the discovery issues involved with the opposing party. Motions in regard to discovery shall be ruled upon by the presiding officer. Opposing parties shall be afforded the opportunity to respond within ten days of the filing of the motion unless the time is lengthened or shortened by the presiding officer. The presiding officer may rule on the basis of the written motion and any response or may order argument on the motion.

**35.19(7) *Use of evidence.*** Evidence obtained in discovery may be used in the contested case proceeding if that evidence would otherwise be admissible in that proceeding.

#### **657—35.20(17A,272C) Issuance of subpoenas in a contested case.**

**35.20(1) *Types of subpoenas.*** Subpoenas issued in a contested case may compel the attendance of witnesses at depositions or hearing and may compel the production of books, papers, records, and other real evidence. A command to produce evidence or to permit inspection may be joined with a command to appear at deposition or hearing or may be issued separately. Subpoenas shall be issued by the executive director or designee upon a written request that complies with the requirements of this rule. A request for a subpoena of mental health records must confirm that the conditions described in subrule 35.20(3) have been satisfied prior to the issuance of the subpoena. The executive director or designee may refuse to issue a subpoena if the request does not comply with the requirements of this rule.

**35.20(2) *Request for subpoena—contents.*** A request for a subpoena shall include the following information, as applicable, unless the subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes:

- a.* The name, address, and telephone number of the person requesting the subpoena;
- b.* The name and address of the person to whom the subpoena shall be directed;
- c.* The date, time, and location at which the person shall be commanded to attend and give testimony;
- d.* Whether the testimony is requested in connection with a deposition or hearing;
- e.* A description of the books, papers, records, or other real evidence requested;
- f.* The date, time, and location for production or inspection and copying; and
- g.* In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 35.20(3) have been satisfied.

**35.20(3) Request for subpoena—mental health records.** In the case of a request for a subpoena of mental health records, the request must confirm compliance with the following conditions prior to the issuance of the subpoena:

- a. The nature of the issues in the case reasonably justifies the issuance of the requested subpoena;
- b. Adequate safeguards have been established to prevent unauthorized disclosure;
- c. An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- d. An attempt was made to notify the patient and to secure an authorization from the patient for the release of the records at issue.

**35.20(4) Content of subpoena.** Each subpoena shall contain, as applicable:

- a. The caption of the case;
- b. The name, address, and telephone number of the person who requested the subpoena;
- c. The name and address of the person to whom the subpoena is directed;
- d. The date, time, and location at which the person is commanded to appear;
- e. Whether the testimony is commanded in connection with a deposition or hearing;
- f. A description of the books, papers, records or other real evidence the person is commanded to produce;
- g. The date, time, and location for production or inspection and copying;
- h. The time within which a motion to quash or modify the subpoena must be filed;
- i. The signature, address, and telephone number of the executive director or designee;
- j. The date of issuance;
- k. A return of service.

**35.20(5) Distribution of subpoena.** Unless a subpoena is requested to compel testimony or documents for rebuttal or impeachment purposes, the executive director or designee shall mail copies of all subpoenas to the parties. The person who requested the subpoena is responsible for serving the subpoena upon the subject of the subpoena.

**35.20(6) Timely motion.** Any person who is aggrieved or adversely affected by compliance with the subpoena, or any party to the contested case who desires to challenge the subpoena, shall, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified, and may be accompanied by legal briefs or factual affidavits.

**35.20(7) Consideration of motion.** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to issue a decision, or the board may issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**35.20(8) Appeal of ruling on motion.** A person aggrieved by a ruling of an administrative law judge who desires to challenge the ruling shall appeal the ruling to the board by serving on the executive director in accordance with rule 657—35.17(17A,272C), a notice of appeal within ten days after service of the decision of the administrative law judge.

**35.20(9) Judicial review.** If the person contesting the subpoena is not a party to the contested case proceeding, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is a party to the contested case proceeding, the board's decision is not final for purposes of judicial review until there is a final decision in the contested case.

**35.20(10) Refusal to obey subpoena.** In the event of a refusal to obey a subpoena, the board may petition the district court for its enforcement. Upon proper showing, the district court shall order the person to obey the subpoena and, if the person fails to obey the order of the court, the person may be found guilty of contempt of court.



**657—35.21(17A,272C) Motions.**

**35.21(1) *Form.*** No technical form for motions is required. Prehearing motions must be in writing, state the grounds for relief, and state the relief sought.

**35.21(2) *Timely response.*** Any party may file a written response to a motion within ten days after the motion is served, unless the time period is extended or shortened by rules of the board or the presiding officer. The presiding officer may consider a failure to respond within the required time period in ruling on a motion.

**35.21(3) *Oral argument.*** The presiding officer may schedule oral argument on any motion.

**35.21(4) *Timely filing.*** Motions pertaining to the hearing shall be filed and served at least ten days prior to the date of hearing unless there is good cause for permitting later action or the time for such action is lengthened or shortened by rule of the board or an order of the presiding officer.

**35.21(5) *Dispositive motions.*** Dispositive motions, such as motions for summary judgment or motions to dismiss, must be filed with the board and served on all parties to the contested case proceeding at least 30 days prior to the scheduled hearing date, unless otherwise ordered or permitted by the presiding officer. Any party may file a written response to a dispositive motion within 10 days after the motion is served, unless the time for response is otherwise lengthened or shortened by the presiding officer.

**657—35.22(17A,272C) Prehearing conference.**

**35.22(1) *Request or order for conference.*** Any party may request a prehearing conference. Prehearing conferences shall be conducted by the executive director, who may request that an administrative law judge conduct the prehearing conference. A written request for prehearing conference or an order for prehearing conference on the executive director's own motion shall be filed not less than seven days prior to the hearing date, unless authorized by the person conducting the prehearing conference. A prehearing conference shall be scheduled not less than three business days prior to the hearing date.

**35.22(2) *Conference subjects.*** Each party shall be prepared to discuss the following subjects at the prehearing conference:

*a.* Submission of expert and other witness lists. Witness lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the prehearing conference. Any such amendments must be served on all parties. Witnesses not listed on the final witness list may be excluded from testifying unless there was good cause for the failure to include their names.

*b.* Submission of exhibit lists. Exhibit lists may be amended subsequent to the prehearing conference within the time limits established by the executive director or administrative law judge at the prehearing conference. Other than rebuttal exhibits, exhibits that are not listed on the final exhibit list may be excluded from admission into evidence unless there was good cause for the failure to include them.

*c.* The entry of a scheduling order to include deadlines for completion of discovery.

*d.* Stipulations of law or fact.

*e.* Stipulations on the admissibility of exhibits.

*f.* Identification of matters which the parties intend to request be officially noticed.

*g.* Consideration of any additional matters which will expedite the hearing.

**35.22(3) *Conducted by telephone.*** Prehearing conferences shall be conducted by telephone unless otherwise ordered.

**35.22(4) *Intra-agency appeal.*** A party must seek intra-agency appeal to the board of prehearing rulings made by an administrative law judge in order to adequately exhaust administrative remedies. Such appeals must be filed within ten days of the date of the issuance of the challenged ruling but no later than the time for compliance with the order or the date of hearing, whichever is first.

**657—35.23(17A,272C) Continuances.** Unless otherwise provided, requests for continuances shall be filed with the board.

**35.23(1) *Requirements of request.*** A written request for a continuance shall:

- a. Be made at the earliest possible time and no less than seven days before the hearing except in case of unanticipated emergencies;
- b. State the specific reasons for the request; and
- c. Be signed by the requesting party or the party's attorney.

**35.23(2) *Notice to parties.*** No request for continuance shall be made or granted without notice to all parties except in an emergency where notice is not feasible. The presiding officer may allow an oral application for continuance at the contested case hearing only in the event of an unanticipated emergency.

**35.23(3) *Authorized individuals.*** The presiding officer or the executive director has the authority to grant or deny a request for a continuance in accordance with this subrule. The executive director or an administrative law judge may enter an order granting an uncontested request for a continuance. Upon consultation with the board chair, the executive director or an administrative law judge may deny an uncontested request for a continuance or may rule on a contested request for continuance.

**35.23(4) *Consideration of request.*** In determining whether to grant a continuance, the presiding officer or the executive director may require documentation of any grounds for a continuance and may consider:

- a. Prior continuances;
- b. The interests of all parties;
- c. The public interest;
- d. The likelihood of settlement;
- e. The existence of an emergency;
- f. Any objection;
- g. Any applicable time requirements;
- h. The existence of a conflict in the schedules of counsel, parties, or witnesses;
- i. The timeliness of the request; and
- j. Other relevant factors.

**657—35.24(17A,272C) Settlement agreements.**

**35.24(1) *Initiation and participation.*** A contested case may be resolved by settlement agreement. Settlement negotiations may be initiated by any party at any stage of a contested case. No party is required to participate in the settlement process.

**35.24(2) *Assistant attorney general and board chair discussion of possible settlement.*** If the respondent initiates or consents to settlement negotiations, the assistant attorney general prosecuting the case may discuss settlement with the board chair without violating the prohibition against ex parte communications in Iowa Code section 17A.17 and without disqualifying the board chair from participating in the adjudication of the contested case. The full board shall not be involved in settlement negotiations until a proposed settlement agreement executed by the respondent is submitted to the board for approval.

**35.24(3) *Board consideration of proposed settlement.*** By signing the proposed settlement agreement, the respondent authorizes an assistant attorney general to have ex parte communications with the board related to the terms of the proposed settlement. If the board fails to approve the proposed settlement agreement, it shall be of no force or effect to either party and shall not be admissible at hearing. Upon rejecting a proposed settlement agreement, the board may suggest alternative terms of settlement, which the respondent is free to accept or reject.

**35.24(4) *Public record.*** A settlement agreement is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.25(17A,124B,126,147,155A,205,272C) Hearing procedures in contested cases.**

**35.25(1) *Presiding officer.*** The presiding officer shall be in control of the proceedings and shall have the authority to administer oaths and to admit or exclude testimony or evidence and shall rule on all motions and objections. The board may request that an administrative law judge assist the board by performing any of these functions.

**35.25(2) *Panel of specialists.*** When, in the opinion of the board, it is desirable to obtain specialists within an area of practice when holding disciplinary hearings, the board may appoint a panel of three specialists who are not board members to make findings of fact and to report to the board. Such findings shall not include any recommendation for or against licensee discipline.

**35.25(3) *Right of participation or representation.*** An applicant or respondent has the right to participate or to be represented in all hearings related to the party's case. Partnerships, corporations, or associations may be represented by any member, officer, director, or duly authorized agent. Any applicant or respondent may be represented by an attorney at the party's own expense.

**35.25(4) *Objections.*** All objections shall be timely made and stated on the record.

**35.25(5) *Rights of all parties.*** Subject to terms prescribed by the presiding officer, parties have the right to introduce evidence on issues of material fact, cross-examine witnesses present at the hearing as necessary for a full and true disclosure of the facts, present evidence in rebuttal, submit briefs, and engage in oral argument.

**35.25(6) *Disorderly conduct.*** The presiding officer shall maintain the decorum of the hearing and may refuse to admit or may expel anyone whose conduct is disorderly.

**35.25(7) *Sequestering witnesses.*** Witnesses may be sequestered during the hearing.

**35.25(8) *Appeal of administrative law judge rulings.*** All rulings by an administrative law judge who acts either as presiding officer or as an aid to the board are subject to appeal to the board. While a party may seek immediate board review of rulings made by an administrative law judge when the administrative law judge is sitting with and acting as an aid to the board or panel of specialists during a hearing, such immediate review is not required to preserve error for judicial review.

**35.25(9) *Conduct of hearing.*** The presiding officer shall conduct the hearing in the following manner:

- a.* The presiding officer shall give an opening statement briefly describing the nature of the proceedings;
- b.* The parties shall be given an opportunity to present opening statements;
- c.* Parties shall present their cases in the sequence determined by the presiding officer;
- d.* Each witness shall be sworn or affirmed by the presiding officer or the court reporter and be subject to examination and cross-examination. The board members and administrative law judge have the right to question a witness. The presiding officer may limit questioning in a manner consistent with law;
- e.* When all parties and witnesses have been heard, parties may be given the opportunity to present final arguments.

**35.25(10) *Open/closed hearing and protective order.*** The hearing shall be open to the public unless the respondent requests that the hearing be closed, in accordance with Iowa Code section 272C.6(1). At the request of either party, or on the board's own motion, the presiding officer may issue a protective order to protect documents which are privileged or confidential by law.

## **657—35.26(17A,272C) Evidence.**

### **35.26(1) *General.***

*a.* Relevant evidence is admissible, subject to the discretion of the presiding officer. Irrelevant, immaterial and unduly repetitious evidence should be excluded. A finding will be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based on hearsay or other types of evidence which may or would be inadmissible in a jury trial.

*b.* The presiding officer shall rule on admissibility of evidence and may, where appropriate, take official notice of facts in accordance with all applicable requirements of law.

*c.* Stipulation of facts is encouraged. The presiding officer may make a decision based on stipulated facts.

*d.* Evidence in the proceeding shall be confined to the issues as to which the parties received notice prior to the hearing unless the parties waive their right to such notice or the presiding officer determines that good cause justifies expansion of the issues. If the presiding officer decides to admit evidence on

issues outside the scope of the notice over the objection of a party who did not have actual notice of those issues, that party, upon timely request, shall receive a continuance sufficient to amend pleadings and to prepare on the additional issue.

*e.* Any party may object to specific evidence or may request limits on the scope of any examination or cross-examination. A brief statement of the grounds upon which it is based shall accompany the objection. The objection, the ruling on the objection, and the reasons for the ruling shall be noted in the record. The presiding officer may rule on the objection at the time it is made or may reserve a ruling until the written decision.

*f.* Whenever evidence is ruled inadmissible, the party offering that evidence may submit an offer of proof on the record. The party making the offer of proof for excluded oral testimony shall briefly summarize the testimony or, with permission of the presiding officer, present the testimony. If the excluded evidence consists of a document or exhibit, it shall be marked as part of an offer of proof and inserted in the record.

**35.26(2) Exhibits.**

*a.* The party seeking admission of an exhibit must provide opposing parties with an opportunity to examine the exhibit prior to the ruling on its admissibility. Copies of documents should normally be provided to opposing parties. Copies of admitted documents should be distributed to individual board members and the administrative law judge. Unless prior arrangements have been made, the party seeking admission of a document should arrive at the hearing prepared with sufficient copies of the document to distribute to opposing parties, board members, the administrative law judge, and witnesses who are expected to examine the document. The state's exhibits shall be marked numerically, and the applicant's or respondent's exhibits shall be marked alphabetically.

*b.* All exhibits admitted into evidence shall be appropriately marked and be made part of the record.

*c.* An original is not required to prove the content of a writing, recording, or photograph. Duplicates or photocopies are admissible. Any objection related to the authenticity of an exhibit shall go to the weight given to that exhibit and not preclude its admissibility.

**35.26(3) Witnesses.**

*a.* Witnesses may be sequestered during the hearing.

*b.* Subject to the terms prescribed by the presiding officer and the limitations in Iowa Rule of Civil Procedure 1.704, parties may present the testimony of witnesses in person, by telephone, by videoconference, by affidavit, or by written or video deposition. If a witness is providing testimony in person, by telephone, or by videoconference, use of any deposition is limited by Iowa Rule of Civil Procedure 1.704.

*c.* Witnesses are entitled to be represented by an attorney at their own expense. In a closed hearing, the attorney may be present only when the client testifies. The attorney may assert legal privileges personal to the client, but may not make other objections. The attorney may only ask questions of the client to prevent a misstatement from being entered into the record.

*d.* The parties in a contested case shall be responsible for any witness fees and expenses incurred by witnesses appearing at the contested case hearing, unless otherwise specified or allocated in an order. The costs for lay witnesses shall be determined in accordance with Iowa Code section 622.69. The costs for expert witnesses shall be determined in accordance with Iowa Code section 622.72. Witnesses are entitled to reimbursement for mileage and may be entitled to reimbursement for meals and lodging, as incurred.

**657—35.27(17A,272C) Default.**

**35.27(1) Failure to appear.** If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in the absence of the party.

**35.27(2) Motion for default.** Where appropriate and not contrary to law, any party may move for default against a party who has requested the contested case proceeding and has failed to file a required pleading or has failed to appear after proper service.

**35.27(3) *Motion to vacate.*** A default decision or a decision rendered on the merits after a party has failed to appear or participate in a contested case proceeding shall become final board action unless, within 15 days after the date of notification or mailing of the decision, a motion to vacate is filed and served on all parties or unless an appeal of a decision on the merits is timely initiated within the time provided by rule 657—35.30(17A,272C). A motion to vacate must state all facts relied upon by the moving party which establish that good cause existed for that party's failure to appear or participate at the contested case proceeding. Each fact so stated must be substantiated by at least one sworn affidavit of a person with personal knowledge of each such fact, which affidavit(s) must be attached to the motion.

**35.27(4) *Appeal.*** The time for further appeal of a decision for which a timely motion to vacate has been filed is stayed pending a decision on the motion to vacate.

**35.27(5) *Proof of good cause.*** Properly substantiated and timely filed motions to vacate shall be granted only for good cause shown. The burden of proof as to good cause is on the moving party. Adverse parties shall have ten days to respond to a motion to vacate. Adverse parties shall be allowed to conduct discovery as to the issue of good cause and to present evidence on the issue prior to a decision on the motion if a request to do so is included in that party's response.

**35.27(6) *"Good cause" defined.*** "Good cause," for purposes of this rule, shall have the same meaning as "good cause" for setting aside a default judgment under Iowa Rule of Civil Procedure 1.971.

**35.27(7) *Appeal of decision on motion to vacate.*** A decision by an administrative law judge granting or denying a motion to vacate is subject to appeal to the board within 20 days.

**35.27(8) *Notice of hearing.*** If a motion to vacate is granted and no timely appeal to the board has been filed, the presiding officer shall issue a rescheduling order setting a new hearing date and the contested case shall proceed accordingly.

**657—35.28(17A,272C) *Ex parte communication.***

**35.28(1) *Prohibited communications.*** Unless required for the disposition of ex parte matters specifically authorized by statute, following issuance of the notice of hearing there shall be no communication, directly or indirectly, between the presiding officer and any party or representative of any party or any other person with a direct or indirect interest in such case in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate. This does not prohibit persons jointly assigned such tasks from communicating with each other. Nothing in this provision is intended to preclude the presiding officer from communicating with members of the board or seeking the advice or help of persons other than those with a personal interest in, or those engaged in personally investigating as defined in subrule 35.13(2), prosecuting, or advocating in, either the case under consideration or a pending factually related case involving the same parties as long as those persons do not directly or indirectly communicate to the presiding officer any ex parte communications they have received of a type that the presiding officer would be prohibited from receiving or that furnish, augment, diminish, or modify the evidence in the record.

**35.28(2) *Duration of prohibition.*** Prohibitions on ex parte communications commence with the issuance of the notice of hearing in a contested case and continue for as long as the case is pending.

**35.28(3) *"Ex parte" defined.*** Written, oral, or other forms of communication are "ex parte" if made without notice and opportunity for all parties to participate.

**35.28(4) *Authorized communications.*** To avoid prohibited ex parte communications, notice must be given in a manner reasonably calculated to give all parties a fair opportunity to participate. Notice of written communications shall be provided in compliance with rule 657—35.17(17A,272C) and may be supplemented by telephone, facsimile, electronic mail, or other means of notification. Where permitted, oral communications may be initiated through conference telephone call including all parties or their representatives.

**35.28(5) *Communications between presiding officers.*** Persons who jointly act as presiding officers in a pending contested case may communicate with each other without notice or opportunity for parties to participate.

**35.28(6) *Others authorized to communicate with presiding officer.*** The executive director or other persons may be present in deliberations or otherwise advise the presiding officer without notice or

opportunity for parties to participate as long as they are not disqualified from participating in the making of a proposed or final decision under any provision of law and they comply with subrule 35.28(1).

**35.28(7) *Communications not prohibited.*** Communications with the presiding officer involving uncontested scheduling or procedural matters do not require notice or opportunity for parties to participate. Parties should notify other parties prior to initiating such contact with the presiding officer when feasible and shall notify other parties when seeking to continue hearings or other deadlines pursuant to rule 657—35.23(17A,272C).

**35.28(8) *Disclosure of prohibited communications received during pendency of case.*** A presiding officer who receives a prohibited ex parte communication during the pendency of a contested case must initially determine if the effect of the communication is so prejudicial that the presiding officer should be disqualified.

*a.* If the presiding officer determines that disqualification is warranted, a copy of any prohibited written communication, all written responses to the communication, a written summary stating the substance of any prohibited oral or other communication not available in written form for disclosure, all responses made, and the identity of each person from whom the presiding officer received a prohibited ex parte communication shall be submitted for inclusion in the record under seal by protective order.

*b.* If the presiding officer determines that disqualification is not warranted, such documents shall be submitted for inclusion in the record and served on all parties.

*c.* Any party desiring to rebut the prohibited communication must be allowed the opportunity to do so upon written request filed within ten days after notice of the communication.

**35.28(9) *Disclosure of prohibited communications received prior to assignment as presiding officer.*** Promptly after being assigned to serve as presiding officer at any stage in a contested case proceeding, a presiding officer shall disclose to all parties material factual information received through ex parte communication prior to such assignment unless the factual information has already been or shortly will be disclosed pursuant to Iowa Code section 17A.13(2) or through discovery. Factual information contained in an investigative report or similar document need not be separately disclosed by the presiding officer as long as such documents have been or will shortly be provided to the parties.

**35.28(10) *Sanctions for violation.*** The presiding officer may render a proposed or final decision imposing appropriate sanctions for violations of this rule, including default, a decision against the offending party, censure, or suspension or revocation of the privilege to practice before the board. Violation of ex parte communication prohibitions by board personnel shall be reported to the executive director for possible sanctions including censure, suspension, dismissal, or other disciplinary action.

**657—35.29(17A,272C) *Recording costs.*** Contested case hearings shall be recorded by electronic means or by a certified shorthand reporter. The board may assess the costs of the certified shorthand reporter to the licensee in a disciplinary hearing which results in disciplinary action taken against the licensee by the board in accordance with 657—subrule 36.10(2). Upon request, the board shall provide a copy of the whole or any portion of the record at cost. The requesting party shall pay the cost of preparing a copy of the record or of transcribing the hearing record. If the request for the hearing record is made as a result of a petition for judicial review, the party who filed the petition shall be considered the requesting party.

**657—35.30(17A,272C) *Proposed decisions.*** Decisions issued by an administrative law judge in nondisciplinary cases are proposed decisions. A proposed decision issued by an administrative law judge becomes a final decision if not timely appealed or reviewed in accordance with this rule.

**35.30(1) *Appeal by party.*** Any adversely affected party may appeal a proposed decision to the board within 30 days after issuance of the proposed decision.

**35.30(2) *Review.*** The board may initiate review of a proposed decision on its own motion at any time within 30 days following the issuance of such a decision.

**35.30(3) *Exhaustion.*** A party must timely seek intra-agency appeal of a proposed decision in order to adequately exhaust administrative remedies.

**35.30(4) Notice of appeal.** An appeal of a proposed decision is initiated by filing a timely notice of appeal with the board. The notice of appeal must be signed by the appealing party or an attorney for that party and contain a certificate of service. The notice shall specify:

- a. The parties initiating the appeal;
- b. The proposed decision or order which is being appealed;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

**35.30(5) Requests to present additional evidence.** A party may request the taking of additional evidence only by establishing that the evidence is material, that good cause existed for the failure to present the evidence at the hearing, and that the party has not waived the right to present the evidence. A written request to present additional evidence must be filed with the notice of appeal or, by a nonappealing party, within 14 days of service of the notice of appeal. The board may remand a case to the presiding officer for further hearing or may itself preside at the taking of additional evidence.

**35.30(6) Scheduling.** The board shall issue a schedule for consideration of the appeal.

**35.30(7) Briefs and arguments.** Unless otherwise ordered, within 20 days of the notice of appeal or order for review, each appealing party may file exceptions and briefs. Within 20 days thereafter, any party may file a responsive brief. Briefs shall cite any applicable legal authority and specify relevant portions of the record in that proceeding. Written requests to present oral argument shall be filed with the briefs. The board may resolve the appeal on the briefs or provide an opportunity for oral argument. The board may shorten or extend the briefing period as appropriate.

**35.30(8) Record.** The record on appeal or review shall be the entire record made before the administrative law judge.

#### **657—35.31(17A) Final decision.**

**35.31(1) Contents.** A final decision of the board shall include findings of fact and conclusions of law. When the board presides over the reception of the evidence at the hearing, its decision is a final decision.

**35.31(2) Hearing fee and costs.** The board may charge a hearing fee and assess other costs to the licensee for conducting a disciplinary hearing which results in disciplinary action taken against the licensee by the board in accordance with 657—subrule 36.10(2).

**35.31(3) Method of service.** Final decisions shall be served on the respondent or applicant using one of the following methods:

- a. Personal service, as provided in the Iowa Rules of Civil Procedure.
- b. Certified mail, return receipt requested.
- c. Signed acknowledgment accepting service.
- d. When service cannot be accomplished using the above methods:
  - (1) An affidavit shall be prepared outlining the measures taken to attempt service; and
  - (2) The final decision shall be published once each week for three consecutive weeks in a newspaper of general circulation, published or circulated in the county of last-known residence of the respondent.
- e. If the respondent or applicant is represented by an attorney, the final decision shall be mailed to the attorney. The attorney may waive the requirement to serve the respondent or applicant through a written acknowledgment that the attorney is accepting service on behalf of the client. The state shall be served by first-class mail or state interoffice mail.

**35.31(4) Public record.** A final decision is a permanent public record open for inspection under Iowa Code chapter 22, in accordance with Iowa Code section 272C.6(4).

#### **657—35.32(17A,124B,126,147,155A,205,272C) Applications for rehearing.**

**35.32(1) By whom filed.** Any party to a contested case proceeding may file an application for rehearing from a final order.

**35.32(2) *Content of application.*** The application for rehearing shall state on whose behalf it is filed, the specific grounds for rehearing, and the relief sought. In addition, the application shall state whether the applicant desires reconsideration of all or part of the board decision on the existing record and whether, upon showing good cause, the applicant requests an opportunity to submit additional evidence. A party may request the taking of additional evidence after the issuance of a final order only by establishing that:

- a. The evidence is material; and
- b. The evidence arose after the completion of the original hearing; or
- c. Good cause exists for failure to present the evidence at the original hearing; and
- d. The party has not waived the right to present additional evidence.

**35.32(3) *Time of filing.*** The application shall be filed with the board within 20 days after issuance of the final decision.

**35.32(4) *Notice to other parties.*** A copy of the application shall be timely mailed by the applicant to all parties of record not joining therein. If the application does not contain a certificate of service, the board shall serve copies on all parties.

**35.32(5) *Disposition.*** Any application for a rehearing shall be deemed denied unless the board grants the application within 20 days after its filing.

**35.32(6) *Only remedy.*** Application for rehearing is the only procedure by which a party may request that the board reconsider a final board decision.

**657—35.33(17A,272C) Stays of board actions.**

**35.33(1) *When available.*** Any party to a contested case proceeding may petition the board for a stay of an order issued in that proceeding or for other temporary remedies, pending review by the board or pending judicial review. The petition shall state the reasons justifying a stay or other temporary remedy. The petition must be filed within 30 days of the issuance of the final order, or if a party filed a request for rehearing that was denied, the petition must be filed within 30 days after the request for rehearing was denied or deemed denied.

**35.33(2) *When granted.*** The board shall not grant a stay in any case in which the district court would be expressly prohibited by statute from granting a stay. In determining whether to grant a stay, the presiding officer or board shall consider the following factors:

- a. The extent to which the applicant is likely to prevail when the court finally disposes of the matter;
- b. The extent to which the applicant will suffer irreparable injury if relief is not granted;
- c. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings;
- d. The extent to which the public interest relied on by the board is sufficient to justify the board's action in the circumstances.

**35.33(3) *Exhaustion required.*** A party must petition the board for a stay pursuant to this rule prior to requesting a stay from the district court in a judicial review proceeding.

**657—35.34(17A,272C) No factual dispute contested cases.** If the parties agree that no dispute of material fact exists as to a matter that would be a contested case if such a dispute of fact existed, the parties may present all relevant admissible evidence either by stipulation or otherwise as agreed by the parties, without necessity for the production of evidence at an evidentiary hearing. If such agreement is reached, a jointly submitted schedule detailing the method and timetable for submission of the record, briefs and oral argument should be submitted to the presiding officer for approval as soon as practicable.

**657—35.35(17A,124B,126,147,155A,205,272C) Emergency adjudicative proceedings.**

**35.35(1) *Necessary emergency action.*** To the extent necessary to prevent or avoid immediate danger to the public health, safety, or welfare, the board may issue a written order in compliance with Iowa Code section 17A.18A to suspend a license in whole or in part, order the cessation of any continuing activity, order affirmative action, or take other action within the jurisdiction of the board by emergency



adjudicative order. Before issuing an emergency adjudicative order, the board shall consider factors including, but not limited to, the following:

- a.* Whether there has been a sufficient factual investigation to ensure that the board is proceeding on the basis of reliable information;
- b.* Whether the specific circumstances that pose immediate danger to the public health, safety, or welfare have been identified and determined to be continuing;
- c.* Whether the person required to comply with the emergency adjudicative order may continue to engage in other activities without posing immediate danger to the public health, safety, or welfare;
- d.* Whether imposition of monitoring requirements or other interim safeguards would be sufficient to protect the public health, safety, or welfare; and
- e.* Whether the specific action contemplated by the board is necessary to avoid the immediate danger.

**35.35(2) Issuance of order.**

*a.* An emergency adjudicative order shall contain findings of fact, conclusions of law, and policy reasons to justify the determination of an immediate danger in the agency's decision to take immediate action.

*b.* The written emergency adjudicative order shall be immediately served on persons who are required to comply with the order by utilizing one or more of the following procedures:

- (1) Personal service, as provided in the Iowa Rules of Civil Procedure; or
- (2) Certified restricted mail, return receipt requested; or
- (3) Signed acknowledgment accepting service.

*c.* To the degree practicable, the board shall select the procedure for providing written notice that best ensures prompt, reliable delivery.

**35.35(3) Notice.** Unless the written emergency adjudicative order is provided by personal delivery on the same day that the order issues, the board shall make reasonable immediate efforts to contact by telephone and electronic mail the persons who are required to comply with the order.

**35.35(4) Completion of proceedings.** Issuance of a written emergency adjudicative order shall include notification of the date on which board proceedings are scheduled for hearing. After issuance of an emergency adjudicative order, the licensee subject to the emergency adjudicative order may request a continuance of the hearing at any time by filing a request with the board. The state may only file a request for a continuance in compelling circumstances. Nothing in this subrule shall be construed to eliminate the opportunity to resolve the matter with a settlement agreement.

**35.35(5) Public record.** An emergency adjudicative order is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.36(17A,147,272C) Application for reinstatement.** Any person whose license has been revoked or has been voluntarily surrendered may apply for reinstatement. An application for reinstatement must be made in accordance with the terms specified in the board's order of revocation or order accepting the voluntary surrender. Any person whose license has been suspended and the board order imposing the suspension indicates that the respondent must apply for and receive reinstatement may apply for reinstatement in accordance with the terms specified in the board's order. All applications for reinstatement must be filed in accordance with this rule.

**35.36(1) Timing of application.** If the order for revocation, suspension, or acceptance of surrender of a license did not establish terms for reinstatement, an initial application for reinstatement may not be filed until at least one year has elapsed from the date of issuance of the order. Persons who have failed to satisfy the terms imposed by the board order revoking, suspending, or accepting surrender of a license shall not be entitled to apply for reinstatement.

**35.36(2) Initiated by respondent.** Reinstatement proceedings shall be initiated by the respondent, who shall file with the board an application for reinstatement of the respondent's license. Such application shall be docketed in the original contested case in which the license was revoked, suspended, or surrendered. The person filing the application for reinstatement shall immediately serve a copy upon

the office of the attorney general and shall serve any additional documents filed in connection with the application.

**35.36(3) Contents.** The application shall allege facts and circumstances which, if established, will be sufficient to enable the board to determine that the basis for the revocation, suspension, or surrender no longer exists and that it shall be in the public interest for the license to be reinstated. The application shall include written evidence supporting the respondent's assertion that the basis for the revocation, suspension, or surrender no longer exists and that it shall be in the public interest for the license to be reinstated. Such evidence may include, but is not limited to, medical and mental health records establishing successful completion of any necessary medical or mental health treatment and aftercare recommendations; documentation verifying successful completion of any court-imposed terms of probation; statements from support group sponsors verifying active participation in a support group; verified statements from current and past employers attesting to employability; and evidence establishing that prior professional competency or unethical conduct issues have been resolved. The burden of proof to establish such facts shall be on the respondent.

**35.36(4) Review for conformity.** The executive director or designee shall review the application for reinstatement and determine if it conforms to the terms established in the board order that revoked, suspended, or accepted surrender of the license and the requirements imposed by this rule. Applications failing to comply with the specified terms or with the requirements in this rule will be denied. Such denial shall be in writing, stating the grounds, and may be appealed by requesting a hearing before the board.

**35.36(5) Hearing and order.** Applications not denied for failure to conform to the terms established in the board order that revoked, suspended, or accepted surrender of the license or requirements imposed by this rule may be set for hearing before the board. The hearing shall be a contested case hearing within the meaning of Iowa Code section 17A.12, and the order to grant or deny reinstatement shall incorporate findings of fact and conclusions of law. If reinstatement is granted, terms may be imposed. Such terms may include, but are not limited to, requiring the licensee to retake and pass an examination required for initial licensure, requiring the licensee to complete continuing education, restricting the licensee from engaging in a particular practice, and imposing a probationary term with monitoring requirements. Nothing shall prohibit the board from issuing an order granting reinstatement without terms, or from entering into a stipulated order granting reinstatement with terms, in the absence of a hearing.

**35.36(6) License reactivation.** A licensee whose license is reinstated must complete the requirements for license reactivation in order to receive an active license.

**35.36(7) Public record.** An order granting or denying reinstatement is a permanent public record open for inspection under Iowa Code chapter 22.

**657—35.37(17A,22,272C) Dissemination of public records.** All documents identified in this chapter as permanent public records open for inspection under Iowa Code chapter 22 are reported to national databanks in accordance with applicable reporting requirements. In addition, these documents may be posted on the board's Web site, published in the board's newsletter, distributed to national or state associations, transmitted to mailing lists or news media, issued in conjunction with a press release, or otherwise disseminated.

**657—35.38(17A) Judicial review.** Judicial review of a final order of the board may be sought in accordance with the terms of Iowa Code chapter 17A.

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23, 124.304, 124B.12, 126.17, 147.55, 155A.6 to 155A.6B, 155A.12, 155A.13 to 155A.13C, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

ITEM 2. Rescind 657—Chapter 36 and adopt the following new chapter in lieu thereof:

CHAPTER 36  
DISCIPLINE

**657—36.1(147,155A,272C) Authority.** The board has the authority to impose discipline for any violations of Iowa Code chapters 124, 124B, 126, 147, 155A, 205, and 272C or the rules promulgated thereunder.

**657—36.2(147,155A,272C) Definitions.** For purposes of this chapter:

“*Board*” means the Iowa board of pharmacy.

“*License*” means any license, registration, or permit issued by the board, regardless of whether the license, registration, or permit is active.

“*Licensee*” means any person or entity possessing a license, registration, or permit issued by the board, regardless of whether the license, registration, or permit is active.

**657—36.3(147,155A,272C) Complaints, investigations, and board action.**

**36.3(1) General.** The board may, upon receipt of a written or verbal complaint or upon its own motion pursuant to other evidence received by the board, review and investigate alleged acts or omissions that may violate the board’s rules or that are related to the ethical or professional conduct of a licensee.

**36.3(2) Confidentiality of investigative files.** Complaint files, investigation files, and all other investigation reports and investigative information in the possession of the board or its employees or agents that relate to licensee discipline shall be confidential pursuant to Iowa Code section 272C.6(4).

**36.3(3) Investigation of allegations.** In order to determine if probable cause exists for a disciplinary hearing, the board, the executive director, or someone designated by the executive director shall cause an investigation to be made into the allegations of the complaint. The licensee that is the subject of the complaint shall be given a reasonable opportunity to present to the investigator a position or defense respecting the allegations of the complaint prior to the commencement of a contested case.

**36.3(4) Investigatory subpoena powers.** The board is authorized by law to subpoena books, papers, records, and any other real evidence, whether or not privileged or confidential under law, which are necessary for the board to decide whether to institute a contested case proceeding. The issuance of investigative subpoenas is governed by rule 657—36.4(17A,147,152,272C).

**36.3(5) Investigative report.** Upon completion of the investigation, the investigator(s) shall prepare a report for the board’s consideration. The report may contain evidence gathered by the investigator, findings made by the investigator, the licensee’s response to the allegations, and the applicable laws or rules alleged to have been violated.

**36.3(6) Board consideration.** The board shall review all investigations. Participation in the review of investigative materials shall not bar any board member from participating in any subsequent disciplinary proceeding.

*a. Board action.* After reviewing an investigation, the board may institute a disciplinary proceeding by filing one or more statements of charges, approve a combined statement of charges and settlement agreement, send a confidential letter of education or administrative warning to the licensee, request additional investigation, including peer review, refer the case to another regulatory authority with jurisdiction over the issue, or close the case without further investigation.

*b. Confidential action.* If the board determines that formal disciplinary action is not warranted, the board may send a confidential letter of education or administrative warning to the licensee. The purpose of a confidential letter of education or administrative warning is to alert the licensee to possible violations of Iowa law or board rules so that the licensee may address the issues. Confidential letters of education and administrative warnings do not constitute formal disciplinary action and are not open for inspection under Iowa Code chapter 22. The board shall maintain a copy of the confidential letter of education or administrative warning in the confidential investigative file regarding the licensee. Confidential letters of education and administrative warnings may be used as evidence against a licensee in future administrative hearings.

**657—36.4(17A,147,152,272C) Issuance of investigatory subpoenas.** The board shall have the authority to issue an investigatory subpoena in accordance with the provisions of Iowa Code section 17A.13.

**36.4(1) *Justification.*** The executive director or designee may, upon the written request of a board investigator or on the executive director's own initiative, subpoena books, papers, records and other real evidence which are necessary for the board to decide whether to institute a contested case proceeding. In the case of a subpoena for mental health records, each of the following conditions shall be satisfied prior to the issuance of the subpoena:

- a. The nature of the complaint reasonably justifies the issuance of a subpoena;
- b. Adequate safeguards have been established to prevent unauthorized disclosure;
- c. An express statutory mandate, articulated public policy, or other recognizable public interest favors access; and
- d. An attempt was made to notify the patient and to secure an authorization from the patient for release of the records at issue.

**36.4(2) *Contents of request.*** A written request for a subpoena or the executive director's written memorandum in support of the issuance of a subpoena shall contain the following:

- a. The name and address of the person to whom the subpoena will be directed;
- b. A specific description of the books, papers, records or other real evidence requested;
- c. An explanation of why the documents sought to be subpoenaed are necessary for the board to determine whether it should institute a contested case proceeding; and
- d. In the case of a subpoena request for mental health records, confirmation that the conditions described in subrule 36.4(1) have been satisfied.

**36.4(3) *Contents of subpoena.*** Each subpoena shall contain the following:

- a. The name and address of the person to whom the subpoena is directed;
- b. A description of the books, papers, records or other real evidence requested;
- c. The date, time and location for production or inspection and copying;
- d. The time within which a motion to quash or modify the subpoena must be filed;
- e. The signature, address and telephone number of the executive director or designee;
- f. The date of issuance;
- g. A return of service.

**36.4(4) *Motion to quash or modify.*** Any person who is aggrieved or adversely affected by compliance with the subpoena and who desires to challenge the subpoena must, within 14 days after service of the subpoena, or before the time specified for compliance if such time is less than 14 days, file with the board a motion to quash or modify the subpoena. The motion shall describe the legal reasons why the subpoena should be quashed or modified and may be accompanied by legal briefs or factual affidavits.

**36.4(5) *Timely filing of motion.*** Upon receipt of a timely motion to quash or modify a subpoena, the board may request an administrative law judge to issue a decision or the board may issue a decision. Oral argument may be scheduled at the discretion of the board or the administrative law judge. The administrative law judge or the board may quash or modify the subpoena, deny the motion, or issue an appropriate protective order.

**36.4(6) *Appeal of administrative law judge ruling.*** A person aggrieved by a ruling of an administrative law judge who desires to challenge that ruling must appeal the ruling to the board by filing a notice of appeal with the board within ten days after service of the decision of the administrative law judge in accordance with rule 657—35.17(17A,272C).

**36.4(7) *Judicial review.*** If the person contesting the subpoena is not the person under investigation, the board's decision is final for purposes of judicial review. If the person contesting the subpoena is the person under investigation, the board's decision is not final for purposes of judicial review until either (1) the person is notified that the investigation has been concluded with no formal action, or (2) there is a final decision in the contested case.

**657—36.5(147,272C) *Peer review committee.*** Any case may be referred to peer review for evaluation of the professional services rendered by the licensee.

**36.5(1) *Contract and case referral.*** The board shall enter into a contract with peer reviewers to provide peer review services. The board or board staff shall determine which peer reviewer(s) will review a case and what investigative information shall be referred to a peer reviewer.

**36.5(2) *Written opinion.*** Peer reviewers shall review the information provided by the board and provide a written report to the board. The written report shall contain an opinion of the peer reviewer regarding whether the licensee conformed to minimum standards of acceptable and prevailing practice of pharmacy and the rationale supporting the opinion.

**36.5(3) *Confidentiality.*** Peer reviewers shall observe the confidentiality requirements imposed by Iowa Code section 272C.6(4).

**36.5(4) *Board review and action.*** The board shall review the committee's findings and proceed with action available under subrule 36.3(6).

**657—36.6(147,155A,272C) Grounds for discipline.** The board may impose any of the disciplinary sanctions set forth in rule 657—36.7(147,155A,272C) when the board determines that the licensee has committed any of the following acts or omissions:

**36.6(1) Fraud in procuring a license.** Fraud in procuring a license includes but is not limited to an intentional perversion of the truth in making application for a license to practice pharmacy, to operate a pharmacy doing business in this state, or to operate as a wholesale drug distributor doing business in this state, or in making application for a registration to practice as a pharmacist-intern, a pharmacy technician, or a pharmacy support person. Fraud in procuring a license includes false representations of a material fact, whether by word or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed when making application, or attempting to file or filing with the board any false or forged diploma, certificate, affidavit, identification, or qualification in making application for a license or registration in this state.

**36.6(2) Professional incompetency.** Professional incompetency includes but is not limited to:

*a.* A substantial lack of knowledge or ability to discharge professional obligations within the scope of the pharmacist's practice.

*b.* A substantial deviation by a pharmacist from the standards of learning or skill ordinarily possessed and applied by other pharmacists in the state of Iowa acting in the same or similar circumstances.

*c.* A failure by a pharmacist to exercise in a substantial respect that degree of care which is ordinarily exercised by the average pharmacist in the state of Iowa acting under the same or similar circumstances.

*d.* A willful or repeated departure from, or the failure to conform to, the minimal standard or acceptable and prevailing practice of pharmacy in the state of Iowa.

**36.6(3) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of pharmacy or engaging in unethical conduct or practice harmful or detrimental to the public.** Proof of actual injury need not be established.

**36.6(4) Habitual intoxication or addiction to the use of drugs.** Habitual intoxication or addiction to the use of drugs includes, but is not limited to:

*a.* The inability of a licensee to practice with reasonable skill and safety by reason of the excessive use of alcohol on a continuing basis.

*b.* The excessive use of drugs which may impair a licensee's ability to practice with reasonable skill or safety.

**36.6(5) Conviction of a felony related to the profession or occupation of the licensee, or a conviction of a felony that would affect the licensee's ability to practice within the licensee's profession.** A copy of the record of conviction or a plea of guilty shall be conclusive evidence.

**36.6(6) Fraud in representations as to skill or ability.** Fraud in representations as to skill or ability includes, but is not limited to, a pharmacist having made deceptive or untrue representations as to competency to perform professional services which the pharmacist is not qualified to perform by virtue of training or experience.

**36.6(7) Use of untrue or improbable statements in advertisements.**

**36.6(8)** Distribution of drugs for other than lawful purposes. The distribution of drugs for other than lawful purposes includes, but is not limited to, the disposition of drugs in violation of Iowa Code chapters 124, 126, and 155A.

**36.6(9)** Willful or repeated violations of the provisions of Iowa Code chapter 147 or 272C. Willful or repeated violations of these Acts include, but are not limited to, a licensee's intentionally or repeatedly violating a lawful rule or regulation promulgated by the board of pharmacy or the Iowa department of public health, violating a lawful order of the board in a disciplinary hearing, or violating the provisions of title IV (public health) of the Iowa Code.

**36.6(10)** Violating a statute or law of this state, another state, or the United States, without regard to its designation as either a felony or misdemeanor, which statute or law relates to the practice of pharmacy or the distribution of controlled substances, prescription drugs, or nonprescription drugs.

**36.6(11)** Failure to notify the board within 30 days after a final decision entered by the licensing authority of another state, territory, or country which decision resulted in a license revocation, suspension, or other disciplinary sanction.

**36.6(12)** Knowingly aiding, assisting, procuring, or advising another person to unlawfully practice pharmacy or to unlawfully perform the functions of a pharmacist-intern, a pharmacy technician, or a pharmacy support person.

**36.6(13)** Inability of a licensee to practice with reasonable skill and safety by reason of mental or physical impairment or chemical abuse.

**36.6(14)** Being adjudged mentally incompetent by a court of competent jurisdiction. Such adjudication shall automatically suspend a license for the duration of the license or registration unless the board otherwise orders.

**36.6(15)** Submission of a false report of continuing education, submission of a false certification of completion of continuing education, or failure to submit biennial reports of continuing education as directed by the board.

**36.6(16)** Failure to notify the board within 30 days after occurrence of any judgment or settlement of a malpractice court claim or action.

**36.6(17)** Failure to file reports concerning acts or omissions committed by another licensee.

**36.6(18)** Willful or repeated malpractice.

**36.6(19)** Willful or gross negligence.

**36.6(20)** Obtaining any fee by fraud or misrepresentation.

**36.6(21)** Violating any of the grounds for revocation or suspension of a license or registration listed in Iowa Code section 147.55, Iowa Code chapter 155A, or any of the rules of the board.

**36.6(22)** Practicing pharmacy without an active and current Iowa pharmacist license, operating a pharmacy without a current pharmacy license, operating a prescription drug wholesale facility without a current wholesale drug license, operating an outsourcing facility without a current outsourcing facility license, practicing as a pharmacist-intern without a current pharmacist-intern registration, assisting a pharmacist with technical functions associated with the practice of pharmacy without a current pharmacy technician registration except as provided in the introductory paragraph of rule 657—3.3(155A), or assisting a pharmacist with nontechnical functions associated with the practice of pharmacy without a current pharmacy support person registration.

**36.6(23)** Attempting to circumvent the patient counseling requirements or discouraging patients from receiving patient counseling concerning their prescription drug orders.

**36.6(24)** Noncompliance with a child support order or with a written agreement for payment of child support as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 252J.

**36.6(25)** Student loan default or noncompliance with the terms of an agreement for payment of a student loan obligation as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 261 or default on a repayment or service obligation under any federal or state educational loan or service-conditional scholarship program upon certification by the program of such a default.

**36.6(26)** Engaging in any conduct that subverts or attempts to subvert a board investigation.

**36.6(27)** Employing or continuing to employ as a practicing pharmacist any person whose Iowa pharmacist license is not current and active, employing or continuing to employ a person to

assist a pharmacist with technical functions associated with the practice of pharmacy who is not currently registered as a pharmacy technician except as provided in the introductory paragraph of rule 657—3.3(155A), or employing or continuing to employ a person to assist a pharmacist with nontechnical functions associated with the practice of pharmacy who is not currently registered as a pharmacy support person.

**36.6(28)** Retaliating against a pharmacist, pharmacist-intern, pharmacy technician, or pharmacy support person for making allegations of illegal or unethical activities, making required reports to the board, or cooperating with a board investigation or survey.

**36.6(29)** Failing to create and maintain complete and accurate records as required by state or federal law or regulation or rule of the board.

**36.6(30)** Violating the pharmacy or drug laws or rules of another state while under the jurisdiction of that state.

**36.6(31)** Having a license revoked or suspended or having other disciplinary action taken by a licensing authority of this state or of another state, territory, or country for conduct substantially equivalent to any of the grounds for disciplinary action in Iowa. A copy of the record from the licensing authority taking the disciplinary action shall be conclusive evidence of the action.

**36.6(32)** Failure to comply with mandatory child or dependent adult abuse reporter training requirements.

**36.6(33)** Failure to timely provide to the board or a representative of the board prescription fill data or other required pharmacy or controlled substances records.

**36.6(34)** Nonpayment of a state debt as evidenced by a certificate of noncompliance issued pursuant to Iowa Code chapter 272D.

**36.6(35)** Failure to notify the board of a criminal conviction relating to the practice of pharmacy or to the distribution of drugs within 30 days of the action, regardless of the jurisdiction where it occurred.

**36.6(36)** Obtaining, possessing, or attempting to obtain or possess prescription drugs without lawful authority.

**36.6(37)** Diverting prescription drugs from a pharmacy for personal use or for distribution.

**36.6(38)** Practicing pharmacy, or assisting in the practice of pharmacy, while under the influence of alcohol or illicit substances.

**36.6(39)** Practicing pharmacy, or assisting in the practice of pharmacy, while under the influence of prescription drugs or substances for which the licensee does not have a lawful prescription or while impaired by the use of legitimately prescribed pharmacological agents, drugs, or substances.

**36.6(40)** Forging or altering a prescription.

**36.6(41)** Practicing outside the scope of the profession.

**36.6(42)** Dispensing, or contributing to the dispensing of, an incorrect prescription, which includes, but is not limited to, the incorrect drug, the incorrect strength, the incorrect patient or prescriber, or the incorrect or incomplete directions.

**36.6(43)** Failing to comply with a confidential order for evaluation.

**36.6(44)** Failing to comply with the terms of an initial agreement or contract with the Iowa monitoring program for pharmacy professionals committee.

#### **657—36.7(147,155A,272C) Disciplinary sanctions.**

**36.7(1)** *Possible sanctions.* The board has the authority to impose the following disciplinary sanctions:

- a.* Revocation of a license issued by the board.
- b.* Suspension of a license issued by the board until further order of the board or for a specified period.
- c.* Nonrenewal of a license issued by the board.
- d.* Prohibit permanently, until further order of the board, or for a specified period, the engaging in specified procedures, methods or acts.
- e.* Probation.
- f.* Require a licensee to complete additional education or training.

- g. Require a pharmacist to successfully complete any reexamination for licensure.
- h. Order a licensee to undergo a physical or mental examination.
- i. Impose civil penalties not to exceed \$25,000.
- j. Issue citation and warning.
- k. Such other sanctions allowed by law as may be appropriate.

**36.7(2) Considerations in determining sanctions.** The board may consider the following factors in determining the nature and severity of the disciplinary sanction to be imposed:

- a. The relative seriousness of the violation as it relates to assuring the citizens of this state a high standard of professional care.
- b. The facts of the particular violation.
- c. Any extenuating circumstances or other countervailing considerations.
- d. Number of prior violations or complaints.
- e. Seriousness of prior violations or complaints.
- f. Whether remedial action has been taken.
- g. Any other factors as may reflect upon the competency, ethical standards, and professional conduct of the licensee.

**657—36.8(147,272C) Voluntary surrender.** A voluntary surrender of a license may be submitted to the board as resolution of a contested case or in lieu of continued compliance with a disciplinary order of the board. A voluntary surrender, when accepted by the board, has the same force and effect as an order of revocation. The voluntary surrender of a license during the pendency of a complaint or investigation shall be considered discipline and shall have the same force and effect as an order of revocation. A request for reinstatement of a license that has been surrendered shall be handled under the terms established by rule 657—35.36(17A,147,272C).

**657—36.9(155A,272C) Order for mental or physical examination.** A licensee is, as a condition of licensure, under a duty to submit to a mental or physical examination within a time period specified by order of the board. Such examination may be ordered upon a showing of probable cause and shall be at the expense of the licensee.

**36.9(1) Content of order.** A board order for mental or physical examination shall include the following items:

- a. A description of the type of examination to which the licensee must submit.
- b. The name and address of the examiner or treatment facility that the board has identified as having the potential to perform the examination.
- c. The time period in which the licensee must schedule the required examination.
- d. The amount of time in which the licensee is required to complete the examination.
- e. A requirement that the licensee cause a report of the examination results to be provided to the board within a specified period of time.
- f. A requirement that the licensee communicate with the board regarding the status of the examination.
- g. A provision allowing the licensee to request additional time to schedule or complete the examination or to request that the board approve an alternative examiner or treatment facility. The board shall, in its sole discretion, determine whether to grant such a request.

**36.9(2) Objection to order.** A licensee who is the subject of a board order and who objects to the order may file a request for hearing. The request for hearing shall specifically identify the factual and legal issues upon which the licensee bases the objection. The hearing shall be considered a contested case proceeding and shall be governed by the provisions of 657—Chapter 35. A contested case involving an objection to an examination order will be captioned in the name of Jane or John Doe in order to maintain the licensee's confidentiality.

**36.9(3) Closed hearing.** Any hearing on an objection to the board order shall be closed pursuant to Iowa Code section 272C.6(4).



**36.9(4) Order and reports—confidential.** An examination order and any subsequent examination reports issued in the course of a board investigation are confidential investigative information pursuant to Iowa Code section 272C.6(4).

**657—36.10(272C) Disciplinary hearings—fees and costs.**

**36.10(1) Definitions.** As used in this chapter in relation to a formal disciplinary action filed by the board against a licensee:

“*Deposition*” means the testimony of a person pursuant to subpoena or at the request of the state of Iowa taken in a setting other than a hearing.

“*Expenses*” means costs incurred by persons appearing pursuant to subpoena or at the request of the state of Iowa for purposes of providing testimony on the part of the state of Iowa in a hearing or other official proceeding and shall include mileage reimbursement at the rate specified in Iowa Code section 70A.9 or, if commercial air or ground transportation is used, the actual cost of transportation to and from the proceeding. Also included are actual costs incurred for meals and necessary lodging.

“*Medical examination fees*” means actual costs incurred by the board in a physical, mental, chemical abuse, or other impairment-related examination or evaluation of a licensee when the examination or evaluation is conducted pursuant to an order of the board.

“*Transcript*” means a printed verbatim reproduction of everything said on the record during a hearing or other official proceeding.

“*Witness fees*” means compensation paid by the board to persons appearing pursuant to subpoena or at the request of the state of Iowa, for purposes of providing testimony on the part of the state of Iowa. For the purposes of this rule, compensation shall be the same as outlined in Iowa Code section 622.69 or 622.72 as the case may be.

**36.10(2) Hearing fee and recoverable costs.** The board may charge a fee not to exceed \$75 for conducting a disciplinary hearing that results in disciplinary action taken by the board against the licensee. In addition to the fee, the board may recover from the licensee costs for the following procedures and personnel:

- a. Recording fees of a certified shorthand reporter.
- b. Transcript.
- c. Witness fees and expenses.
- d. Depositions.

**36.10(3) Fees, costs as part of disciplinary order.** Fees and costs assessed by the board shall be described as part of the board’s final disciplinary order. Fees and costs that can be calculated at the time of the issuance of the board’s final disciplinary order shall be itemized in the order. Fees and costs that cannot be calculated at the time of the issuance of the board’s final disciplinary order may be invoiced to the licensee at a later time, provided that the board’s final disciplinary order states that the particular fees and costs will be invoiced at a later date. The board’s final disciplinary order and any invoices shall specify the time period in which the licensee shall pay the assessed fees and costs.

**36.10(4) Board treatment of collected fees, costs.** Fees and costs collected by the board shall be allocated to the expenditure category of the board in which the hearing costs were incurred. The fees and costs shall be considered repayment receipts as defined in Iowa Code section 8.2.

**36.10(5) Failure to pay assessed fees, costs.** Failure of a licensee to pay the fees and costs assessed herein within the time period specified in the board’s final disciplinary order or subsequent invoice shall constitute a violation of a lawful order of the board.

These rules are intended to implement Iowa Code sections 17A.10 to 17A.23, 124.304, 124B.12, 126.17, 147.55, 155A.6 to 155A.6B, 155A.12, 155A.13 to 155A.13C, 155A.15 to 155A.18, 155A.26, 205.11, 272C.3 to 272C.6, 272C.9, and 272C.10.

[Filed 9/8/17, effective 11/1/17]

[Published 9/27/17]

EDITOR’S NOTE: For replacement pages for IAC, see IAC Supplement 9/27/17.